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No. 87-1047

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

NATIONWIDE CORPORATION AND
NATIONWIDE MUTUAL INSURANCE COMPANY,
Petitioners,

v.

HOWING COMPANY AND
DOUGLAS MCLELLAN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

Respondents concede that the Sixth Circuit's decision "has potentially important business and economic ramifications" and that it presents an issue of "first impression" for this Court. (Opposition at 3, 5.) They oppose certiorari solely on the ground that the current split of federal authority on whether Section 13(e)(1) of the Securities Exchange Act creates a private cause of action is not between two *appellate* courts. Notwithstanding respondents' singleminded focus on the absence of other appellate opinion, there are compelling reasons for granting the writ.

First, this Court has repeatedly recognized that it must play an active role in shaping the law concerning the implication of private causes of action. The Court's decisions establish that such cases present "important question[s] of federal law" which should be "settled by this Court." Sup. Ct. R. 17.1(c). Thus, as recently as *Thompson v. Thompson*, 56 U.S.L.W. 4055 (U.S. Jan. 12, 1988) (No. 86-694), the Court granted certiorari and decided such a case notwithstanding the absence of division among the courts of appeals. In six other recent cases, this Court granted certiorari to reverse appellate opinions implying private causes of action where no split in the circuits was presented.[1]

Second, this is a case where an appellate court "has decided a federal question in a way in conflict with applicable decisions of this Court"—an independent consideration supporting certiorari regardless of the views of other courts of appeals. *See* Sup. Ct. R. 17.1(c). The Sixth Circuit's creation of a private cause of action based on Congressional silence directly conflicts with the standards announced in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979), and *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979). (*See* Petitioner's Brief at 14-19.) Indeed, two members of this Court recently stated that those decisions "effectively overruled" *Cort v. Ash*, 422 U.S. 66 (1975), a decision which the Sixth Circuit believed was critical to its holding in this case. *Compare* 10a-13a *with Thompson*, 56 U.S.L.W. at 4059 (Scalia & O'Connor, JJ., concurring).

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[1] *See Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 138 (1985); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 9 (1981); *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 767 (1981) (certiorari granted "[b]ecause of the importance of the implied-right-of-action issue"); *California v. Sierra Club*, 451 U.S. 287, 292 (1981); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 567 (1979); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 14 (1979) (certiorari granted "to consider the important federal question presented").

Respondents also make a half-hearted defense of the merits of the decision below in their effort to block review in this Court. But respondents' arguments are contrary to the legislative history of Section 13(e)(1) and decisions of this Court. Respondents offer no support for their theory that Section 13(e)(1) was "patterned after" Section 14(a) of the Securities Exchange Act. Indeed, the clear uncontradicted statement of Section 13(e)(1)'s author is that Section 15(c), not Section 14(a), was the model for Section 13(e)(1). *See* 114 Cong. Rec. 21,954 (1968) (remarks of Sen. Williams). Thus, the fact that this Court had recognized an implied cause of action under Section 14(a) when Section 13(e)(1) was enacted is simply irrelevant. Moreover, respondents' contention that "Congress did not exclude a private cause of action under § 13(e)" reverses the governing standard: the burden is on the proponents of an implied cause of action to establish that Congress evidenced an intent to create such a cause of action. *See, e.g., Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 145 (1985).

Finally, respondents' bare assertion that "the 'contemporary legal context' supports the finding of a private right" merely underscores the Sixth Circuit's expansion of *Cannon v. University of Chicago*, 441 U.S. 677 (1979), into a test which looks only to the date of a statute's enactment and not its textual origins. As Justices Scalia and O'Connor recently noted:

> [C]*ontext alone cannot suffice.* We have held context to be relevant to our determination in only two cases—both of which involved statutory language that, in the judicial interpretation of related legislation prior to the subject statute's enactment, or of the same legislation prior to its reenactment, had been held to create private rights of action.

Thompson, 56 U.S.L.W. at 4059 (citing *Cannon* and *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982)) (emphasis supplied). The origins and

legislative history of Section 13(e)(1) do not present the exceptional circumstances present in either *Cannon* or *Merrill Lynch*. As a result, the decision below conflicts with the application of *Cannon* by other appellate courts, and in fact presents the "split of appellate authority" respondents claim is lacking. Compare 8a-9a *with Siebert v. Conservative Party*, 724 F.2d 334, 337 (2d Cir. 1983), *cert. denied*, 466 U.S. 980 (1984).[2]

The issues raised by the petition warrant this Court's plenary review. As it has in prior cases where appellate courts have reached out and created novel implied causes of action, this Court should grant certiorari. Such review is especially appropriate here where, as respondents concede, the new cause of action has crucial implications for mergers involving the purchase of over $20 billion of securities a year.

Respectfully submitted,

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[2] Respondents seek to evade this split by opining that "[t]his case deals only with § 13(e)." But it is axiomatic that principles of law used to construe one statute are to be applied in other cases involving other statutes. Here, the Sixth Circuit has explicitly created a presumption that *all* statutes passed before 1975 include an implied private remedy absent expressed Congressional intent to the contrary. (8a-9a, 11a-12a.) The far-reaching implications of this presumption are obvious.